Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

NO. _____

In the Supreme Court of the United States

CAROL LEE MCGONEGAL,
Petitioner,

v.

STATE OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE OHIO SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. The evidence in this case showed that the petitioner willingly spoke to police officers after having been advised of her rights under Miranda v. Arizona, 384 U.S. 436 (1966). However, petitioner did not tell the officers that she committed the offense only under threat of harm. At trial, petitioner's defense rested on her contention that she only committed the offense under duress. The prosecution "used" her silence about duress during the post-arrest interview to suggest that petitioner had fabricated the defense after-the-fact. The question for this Court is whether petitioner had a Fifth Amendment right to remain silent on the defense aspect of her case, thus precluding the prosecution from using her silence to obtain a conviction.

2. Petitioner was charged with a specific drug offense on a specific date. Yet much of her trial consisted of evidence that she participated in many other large quantity drug trafficking offenses. Whenever the prosecution seeks to have this kind of inflammatory evidence admitted, there exists a tension between the state's desire to prove its case with that evidence and the defendant's constitutional right to have the verdict based on the merits of the case and not on some visceral reaction to evidence of the inflammatory acts. The question here is whether the jury was unduly swayed by that inflammatory evidence, particularly since the trial court gave no limiting instruction about the proper use of the evidence.

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THE BASIS FOR JURISDICTION

Petitioner seeks review of the judgment of the Court of Appeals for Montgomery County, Ohio. On March 4, 2002, the Ohio Supreme Court denied her Memorandum in Support of Supreme Court Jurisdiction. Petitioner is filing this Petition for Writ of Certiorari as a matter of right. The Montgomery County Court of Appeals decided an important questions of law that should be settled by this Court, pursuant to Supreme Court Rule 10(c).

STATEMENT OF THE CASE

A. The procedural facts.

On July 14, 1998, petitioner was indicted by the grand jury for Montgomery County, Ohio, and was charged with one count of possessing marijuana in an amount over 20,000 grams. O.R.C. 2925.11(A). The case proceeded to jury trial.

At trial, petitioner admitted her involvement in the offense, but claimed that she did so only out of fear of her boyfriend. After the defense portion of the case was completed, a police officer testified on rebuttal that petitioner had never claimed duress until the first day of trial. Defense counsel's objections to that testimony were overruled. (TR 393-396.)

The prosecution evidence also showed that petitioner had accompanied her boyfriend on numerous marijuana-buying trips to Arizona. Appellant objected to this evidence on the grounds that it was inflammatory, but the objections were overruled. (TR 161-162.)

The jury returned a guilty verdict on October 19, 2000. The trial court then imposed sentence on December 6, 2000. It sentenced petitioner to a prison term of 8 years.

Petitioner then appealed to the Court of Appeals for Montgomery County, Ohio. She argued both issues that she now seeks this Court to review. First, she argued that by putting on the rebuttal witness who testified that petitioner had not previously raised the duress defense, the prosecution had impermissibly violated her privilege against self-incrimination, and had committed misconduct. Further, she argued that her right to due process was violated by the prosecution's many references to other acts of drug dealing. (See First and Second Assignments of Error in Appellant's Opening Brief, filed on June 25, 2001.) But in a decision issued on November 2, 2001, the state appellate court affirmed the conviction.

Petitioner then filed a Memorandum in Support of Supreme Court Jurisdiction in the Ohio Supreme Court. In that Memorandum, petitioner raised the same two issues that she had raised in the intermediate appellate court. (See First and Second Propositions of Law in the Memorandum in Support of Supreme Court Jurisdiction, filed on December 14, 2001, in the Ohio Supreme Court.) On March 4, 2002, the Ohio Supreme Court issued its decision denying jurisdiction. From that decision, this Petition for Writ of Certiorari follows.

B. The facts brought out at trial.

Petitioner is in her middle fifties. She had lived for a long time in San Diego, and had married in 1980 and raised a family there. (TR 309.) However, she and her husband separated in 1992 or 1993. (TR 309.) In 1995 petitioner met

Robert Downing[1], and the two of them became romantically involved. (TR 259.) At some point thereafter, Downing moved to Dayton, Ohio and he established a marijuana trafficking business. After that, petitioner moved to Dayton to be with her boyfriend. (TR 264-265.) The two of them lived in a house in a house that Downing had purchased. (TR 262.)

In 1997 petitioner established her own business, a restaurant called What's Cooking. (TR 293, 341.) According to one police officer, the restaurant appeared be profitable and well run, and did not seem to be connected in any way with Downing's drug trafficking business. (TR 255, 267.)

However, two of petitioner's restaurant employees sold marijuana for Downing. Petitioner fired these two employees, and they decided to "get even." (TR 156.) On the afternoon of June 12, 1998, Ron Jackson, one of the employees, called the restaurant and told petitioner that he was calling the police to report about a motor home filled with marijuana. (TR 342.) Petitioner then gave the phone to Downing. Afterward, Downing told petitioner that they had to go to the storage area. (TR 343.) The two then drove to a storage facility called the Lock-and-Store. When they arrived the former restaurant employees were there and they began taunting the couple. (TR 343.) Downing and petitioner then left, but they returned soon after. (TR 344.)

The defense evidence showed that when they left the storage facility, the couple stopped somewhere and Downing made a phone call. When he returned to the car, he told petitioner that she had to drive the motor home off of the Lock-and-Store lot. He said that if she did not do so, "they"

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[1] "Robert Downing" is actually an alias. His real name is Andre Ghanime. (TR 257.)

would kill her. (TR 344-346.) Petitioner felt she had no choice but to comply, and thought that if she refused Downing would become physically violent toward her. (TR 244-246.) For that reason she agreed to drive the vehicle off of the lot. (TR 346.)

Apparently, Ron Jackson had made good on his threat. On that same afternoon someone had called the police to report about a marijuana-filled motor home in the Lock-and-Store facility. (TR 97.) Police dispatch then sent several officers to see if a motor home matching the description might be driven off the lot. The officers intended to initiate a traffic stop if the vehicle left the lot. (TR 24, 59, 98.) And sure enough, the officers at the scene saw a motor home drive out of the lot. The officers stopped the vehicle. (TR 33-34, 62-63.) Petitioner was driving, and she was the only occupant. (TR 35, 63.) The officers immediately noticed a strong odor of marijuana emanating from the motor home. (TR 35, 63-64, 88.) They arrested petitioner when they learned that her California driver's license had been suspended. (TR 37-38, 67.) The officers soon discovered about 300 pounds of marijuana inside the vehicle.

After she was arrested, petitioner cooperated with the police and made a written statement. (TR 156-159.) In the statement she said that after the phone call from Ron Jackson, Downing "demanded" that she go to the storage facility and drive the motor home off of the lot. (TR 157.) She did so as Downing waited outside. (TR 157.) In the statement petitioner also inferred that the marijuana and the marijuana business was Downing's. She said that about 600 pounds of marijuana had been brought from Tucson, but that she had no idea of how much was left in the motor home, "for Robert [Downing] took care of his business without me. How much money was received was kept from my knowledge. It was not

kept at the house." (TR 158.) Petitioner did not know the last name of the person Downing sold the marijuana to, and while she did know that Ron Jackson and Mel [the other fired employee] had sold for Downing, she did not know how much. (TR 158.) Finally, petitioner admitted accompanying Downing when he made marijuana purchases in Tucson. She said that the transactions were conducted in Spanish, a language in which Downing is fluent. (TR 158-159.)

The defense argued that petitioner had acted under duress. Petitioner's former husband, James, testified that petitioner changed dramatically after she moved to Dayton to be with Downing. James recounted how in the spring of 1997, Downing called him to say that he wanted James' help to have petitioner committed. Downing told him that petitioner was simply incompetent to run a business and to raise her and James' son. (TR 312.) (Petitioner had custody of her and James' 17-year-old son.) James recounted numerous incidents in which Downing demeaned and berated petitioner, all the while using vile epithets. (TR 313-318.)James also testified that as a general matter, Downing was constantly drinking, and that he had a very unpredictable personality. (TR 321.)

Angus, petitioner and James' son, testified that Downing was a heavy drinker who had severe mood swings. Downing constantly called petitioner names, and these insults came "out of nowhere." (TR 325-326.) He also told of the many occasions when petitioner and Downing would fight all night long. (TR 326-328.)

A friend of petitioner's, who worked at her restaurant, also testified. This witness had also lived with petitioner and Downing for about six or eight months. (TR 294.) She verified that Downing would constantly demean and humiliate petitioner, and call her vile names. (TR 296-301.)

Petitioner also testified, and she confirmed that Downing was an abusive tyrant. She told of an incident on Christmas of 1997, when she and petitioner had traveled to Phoenix with Angus. Downing woke them in the middle of the night, and kicked them both out of the apartment. (TR 346-348.) Downing constantly demeaned and criticized petitioner; he was always "going off." (TR 348.) He wanted to control everybody. (TR 352.) He physically abused petitioner too. He pulled a gun on her, and he repeatedly threatened to kill her. (TR 349.) When she told him that she wanted to return to California, Downing replied that petitioner knew too much and that if she did so she would be killed. (TR 351.) Downing used heroin. (TR 353.)

While petitioner was aware of Downing's marijuana operation, and while she accompanied him on his buying trips, she did not actually participate. (TR 358-359.) She had never before been to the Lock-and-Store, and she did not know the lock combination for entering the facility. (TR 360.) Linda Mershot, Downing's ex-wife, partnered with him in the trafficking business; she handled the books and the money. (TR 361.)

The defense also called Kevin Bollinger to testify. Bollinger is a Dayton police detective assigned to the narcotics bureau. He works at the state and federal level, and was the primary investigator on the follow-up investigation in this case. (TR 249.) He testified that Downing has two convictions from Canada; one a theft, the other a drug offense. In addition, Downing has a warrant out from Rome, Italy, where he was accused of possessing five kilograms of heroin. Bollinger also testified that Downing may well have some convictions in Mexico. (TR 253-254.)

Bollinger testified that his investigation revealed that: 1 - petitioner did not directly profit from Downing's transactions, and she had no drug money in her bank accounts (TR 254-255); 2 – her restaurant was not purchased with drug money, nor was the business in any way a "front" for Downing's business (TR 255); 3 – in her dealings with authorities, petitioner was straightforward and held nothing back (TR 255-256); 4 – petitioner did not directly sell or buy marijuana, and the drug business, including the marijuana found on June 12, was Downing's and his ex-wife's, Linda Marshot (TR 256-257); 5 – prior to June 12, petitioner had never driven any vehicle containing marijuana unless Downing was also present (TR 258); 6 – petitioner never paid for any of the drug trips, and she never received a percentage of his profits from drug sales (TR 258-259); 7 – in the investigation, petitioner was very cooperative, and her information proved to be very useful, even essential. (TR 280.)

On cross-examination, Bollinger revealed that Downing and Marshot are now in federal court as a result of the facts underlying this case. (TR 269.) Bollinger also testified that there has been a conflict between the state and federal authorities with respect to this case. Bollinger believed that petitioner's case should have been in federal court and not in state court. (TR 278-280.)

FIRST ARGUMENT

I. THE CONSTITUTIONAL PRIVILEGE AGAINST SELF-INCRIMINATION REQUIRES THAT WHEN A DEFENDANT GIVES A POST-ARREST STATEMENT ADMITTING SOME CULPABILITY, BUT FAILS TO STATE THAT SHE WAS FORCED TO COMMIT THE OFFENSE, THE PROSECUTON MAY NOT "USE" HER SILENCE WITH RESPECT TO THE DURESS DEFENSE TO INCRIMINATE HER AT TRIAL

Petitioner did not deny driving the motor home containing the marijuana, and in fact she admitted that she knew of her boyfriend's drug dealings. However, she denied that she was involved in the drug trade herself, and she maintained that she only drove the motor home on the day of the arrest because of Downing's threats of bodily harm if she refused. Thus, petitioner relied on a defense of duress, that she committed the offense only because she was forced to.

During the trial the prosecution objected to petitioner presenting a duress defense, on the ground that the prosecution did not receive proper notice. The trial court overruled that objection, and noted that petitioner had requested a jury instruction on duress well before trial began, and that the prosecution had received notice of that request.

However, and notwithstanding the court's ruling, the prosecution sought to undercut the duress defense by suggesting that it was fabricated for the purposes of trial. A police detective, who was also the case agent and who sat with the prosecution throughout trial (TR 114), testified on rebuttal. Under prosecutorial questioning, the witness testified

that based on her review of the records and her familiarity with the proceedings, petitioner had never claimed duress until the first day of trial. Defense counsel's strenuous objections to this line of questioning were overruled. (TR 393-396.) Petitioner contends that this evidence was inadmissible comment on her choice to remain silent after the arrest.

The privilege against self-incrimination is guaranteed by the Fifth Amendment of the United States Constitution. The self-incrimination clause "is founded on a complex of values," all of which support one overriding thought: the respect a government "must accord to the dignity and integrity of its citizens." Miranda v. Arizona, supra, 384 U.S. 436, 460. Thus, the Fifth Amendment "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." Griffin v. California, 380 U.S. 609, 615 (1965).

It is well established that a defendant may not be penalized for exercising his or her constitutional rights. In Griffin v. California, the court held that the prosecution could not *use* the fact that a defendant chooses to invoke the right not to testify. Similarly, it is fundamentally unfair for a prosecutor to insinuate that a defendant's post-Miranda silence is evidence of guilt or evidence of a comprehension level inconsistent with an insanity defense. Doyle v. Ohio, 426 U.S. 610 (1976).

It is clear that a prosecutor may not comment on the fact that a defendant chose to remain silent after receiving Miranda warnings. Doyle v. Ohio, supra. Just as clearly, the prosecution here elicited comment on that fact. By eliciting from the rebuttal witness that petitioner did not even hint that she acted under duress until the trial began, the state sought

to convict petitioner by her own silence. Perhaps even worse, the state's rebuttal evidence invited the jurors to convict petitioner based on her *attorney's decision* not to share the duress defense with the prosecution prior to trial. Thus, the prosecution sought to convict petitioner because she chose to remain silent about an aspect of her defense until the day of trial. But just as clearly, the prosecution may not use a defendant's post-arrest silence to obtain a conviction.

Petitioner also contends that by asking the question that called for a comment on petitioner's decision to remain silent, the prosecution committed misconduct. The prosecutor's interest should not be in winning a criminal case, but in seeing that justice is done. Berger v. United States, 295 U.S. 78, 88 (1935). Misconduct will be deemed to have denied a defendant a fair trial when the misconduct creates a danger that the jury would convict the defendant on extraneous considerations rather than on the evidence. Taylor v. Kentucky, 436 U.S. 478, 488 (1978). Here, petitioner believes that the prosecution's decision to elicit comment on the defense's choice to remain silent amounted to misconduct. The statement went beyond the evidence, and instead attacked the defense's strategic choices. Further, the remark invited the jurors to decide the case not on the evidence or the law, but rather on matters that they had no business considering.

In its opinion the Ohio State Court of Appeals concluded that there was no misconduct since the prosecutor committed no act that in and of itself was improper. This suggests that the prosecutor must speak in order to commit misconduct. Petitioner disagrees. She believes that the insistence on calling a witness to testify about forbidden topics can amount to misconduct. But in the alternative, petitioner also contends that the trial court erred by allowing the testimony.

Petitioner presented convincing evidence, much of it from a police detective on the case, that she was not enmeshed in Downing's drug trafficking endeavors. Petitioner and Downing were a romantic couple. And while she may have been aware of his drug dealings, and while she might have accompanied him on several buying trips, there was strong evidence to suggest that she was "just along for the ride." Further, there was also strong evidence to suggest that petitioner's relationship with Downing was spiraling downward very fast, and that he was fearsome and abusive. Thus, there was substantial evidence from which the jury could have concluded that petitioner did in fact act under duress on the day of the arrest.

But the rebuttal testimony entirely undercut that defense. By telling the jurors that she had heard no suggestion of a duress defense until the first day of trial, the police detective (and case agent) also strongly suggested that this "defense" was a fabrication, conjured up by the petitioner in a desperate maneuver to avoid imprisonment. But the problem with that evidence is that it was also an impermissible comment on the defendant's post-arrest silence. Further, it invited the jury to convict based on what may well have been defense counsel's trial strategy.

SECOND ARGUMENT

II. IN A DRUG PROSECUTION WHERE A DEFENDANT IS ACCUSED OF ONE OFFENSE ON A PARTICULAR DAY, THE ADMISSION OF EVIDENCE OF MULTIPLE, UNCHARGED DRUG TRAFFICKING ACTS COMMITTED BY THIS SAME PERSON ON DIFFERENT OCCASIONS CAN BE SO PREJUDICIAL SO AS TO DENY THE DEFENDANT A FAIR TRIAL AS GUARANTEED BY THE DUE PROCESS CLAUSE

Petitioner was charged with a specific offense. The indictment alleged that she possessed a certain amount of marijuana on July 12, 1998. However, the prosecution's evidence also posited that she had accompanied Downing on several drug-buying trips to Arizona, in incidents unrelated to the possession charge on June 12.

When the prosecutor examined Detective Auricchio, he elicited information that petitioner had, for the three years preceding her arrest, accompanied Downing on about ten buying trips to Arizona. According to the witness, petitioner had admitted that on each of these trips Downing bought about 600 pounds of marijuana, and then she would accompany Downing as he drove the marijuana back to Dayton. In addition, Auricchio told about an incident in which petitioner reported that she once flew alone to Arizona, and carried about $100,000 for a marijuana purchase.[2] Petitioner's objection to these "other acts" was overruled.

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[2] As with the other incidents, petitioner disclaimed actually making the purchase. She took the money out so that Downing could ultimately make the transaction. (TR 162.)

(TR 161-162.) Later, Detective Bollinger testified that petitioner admitted to accompanying Downing on exactly eight buying trips. On each occasion Downing bought between 150 and 600 pounds of marijuana, and then he and petitioner would drive the merchandise back to Dayton in the motor home. (TR 281-282.)

In this argument petitioner contends that the evidence of these other acts was unnecessary and incidental to the prosecution of this one possession offense, and that the admission of that evidence violated her right to a fair trial as guaranteed by the due process clause.

This Court has held that evidence of other crimes may be admitted under two circumstances: 1) when that evidence is not admitted to show that the defendant acted in conformity in the present instance, and 2) when the trial court also gives a limiting instruction advising the jury of the proper uses for that evidence. Spencer v. Texas, 385 U.S. 554, 558, 563-64 (1967); accord Estelle v. McGuire, 502 U.S. 62, 74-75 (1991). In Spencer, this Court did not specifically say that the limiting instruction had to be given. However, this Court relied on the instruction for its conclusion that there was no due process violation in that case.

Since Spencer, at least three federal circuits have held that to admit propensity evidence without also giving a limiting instruction violates the due process clause of the constitution. See: Panzavecchia v. Wainwright 658 F.2d 337, 341 (5th Cir. 1981) - due process violation when jury heard repeated references to past criminal conduct without limiting instruction; Murray v. Superintendent, Ky. State Penitentiary, 651 F.2d 451, 453 (6th Cir. 1981) - unfair and a due process violation to admit evidence of other crimes without a limiting instruction; Garceau v. Woodford, 275 F.3d 769, 773 (9th

Cir. 2001) – instruction on other crimes evidence *invited* jury to use the evidence to show defendant's character or his conduct on a specific occasion; court found due process violation.

Ohio's Evidence Rule 404(B) is similar to the federal rule. The rule generally precludes the admission of "propensity" evidence, but does allow for the admission of other crimes or wrongs for certain limited purposes, such as to show proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. In addition, and as with the comparable federal rule, even if the other act is admissible under Evidence Rule 404(B), it is nevertheless inadmissible if its prejudicial effect outweighs the probative value. Ohio Evid. R. 403(A).

In this case, none of the factors listed in Rule 404 would have made the other crimes evidence admissible. First of all, motive or intent were not at issue. The prosecution charged petitioner with possessing marijuana. Thus, the state was required to prove that she acted knowingly - that she was aware that her conduct would probably cause a certain result or be of a certain nature, regardless of his purpose. (O.R.C. 2901.22(B).) If petitioner committed the charged acts, then her purpose was not at issue. Nor was her intent, which is implicit in the acts charged. The only issue was whether she committed the acts. That issue cannot be proved by evidence of other acts because that proof necessarily relies on the prohibited inference of propensity.

Nor was scheme, plan or system at issue. Here, petitioner did not deny knowing that there was marijuana in the motor home, and she did not deny a general knowledge that Downing was involved in the drug trade. However, her defense was that she was not part of the trafficking, that she

was not a "co-possessor" of the marijuana, and that she only drove the motor home under threat of death or bodily harm. Based on that factual scenario, there was simply no need for the jury to hear of the other transactions.

Nor was absence of mistake or accident at issue. Petitioner never denied her awareness of Downing's involvement in drug trafficking, and she never denied knowing that there was marijuana in the motor home she was driving on the day of her arrest.

Most important though, the trial court here never instructed the jurors about how they should consider the other act evidence. Under Spencer v. Texas, supra, it would appear that a limiting instruction is required under these circumstances. And under Panzavecchia v. Wainwright, supra, Murray v. Superintendent, Ky. State Penitentiary, supra, and Garceau v. Woodford, supra, the failure to give a limiting instruction was clearly error.

The admission of the other acts was likely prejudicial. Petitioner was charged with a specific offense on a specific date. But the state's evidence revealed that she also accompanied Downing on eight marijuana buying trips in which hundreds of pounds of marijuana were transported to Dayton. Even if that evidence could have been admissible to show one of the motivations listed in Ohio Evidence Rule 404(B), it is still true that the jury in this case received no limiting instruction. Thus, the jury was free to, and very likely did, consider the "other crimes" evidence as an indication that petitioner had a propensity for trafficking in marijuana.

CONCLUSION

For the reasons stated in the foregoing petition, petitioner asks that this Court grant certiorari.

Respectfully Submitted,

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APPENDIX A

THE SUPREME COURT OF OHIO

NO. 01-2164

[Filed March 4, 2002]

State of Ohio,)
Appellee,)
v.)
)
Carol Lee McGonegal,)
Appellant.)
)

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismiss the appeal as not involving any substantial constitutional question.

COSTS:

Docket Fee, $40.00, paid by Rion, Rion & Rion L.P.A., Inc.

(Montgomery County Court of Appeals; 18639)

/s/_____
THOMAS J. MOYER
Chief Justice

APPENDIX B

IN THE COURT OF APPEALS
FOR MONTGOMERY COUNTY, OHIO

C.A. NO. 18639

T.C. NO. 99 CR 02045

[Filed November 2, 2001]

STATE OF OHIO	)
Plaintiff-Appellee	)
	)
v.	)
	)
CAROL LEE MCGONEGAL	)
Defendant-Appellant	)
	)

FINAL ENTRY

Pursuant to the opinion of this court rendered on the 2nd day of November, 2001, the judgment of the trial court is Affirmed. Costs are to be paid as provided in App.R. 24.

/s/_____
WILLIAM H. WOLFF, JR.
PRESIDING AND ADMINISTRATIVE
JUDGE

/s/_____
THOMAS J. GRADY, JUDGE

/s/_____
FREDERICK N. YOUNG, JUDGE

APPENDIX C

COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

C.A. CASE NO. 18639
T.C. CASE NO. 99 CR 02045

[Filed November 2, 2001]

STATE OF OHIO,	)
Plaintiff-Appellee	)
	)
v.	)
	)
CAROL LEE MCGONEGAL,	)
Defendant-Appellant	)
	)

JUDGES:
GRADY, J. WOLFF, P.J. and YOUNG, J., concur.

OPINION

GRADY, J.

Defendant, Carol Lee McGonegal, appeals from her conviction and sentence for possessing marijuana in an amount over 20,000 grams, in violation of R.C. 2925.11(A).

McGonegal owned a restaurant in Dayton where she employed Ron Jackson and Mel Rue. In addition to their restaurant employment, Jackson and Rue sold marijuana for McGonegal's boyfriend, Andre Ghanime aka Robert Downing ("Downing"). Through the course of their dealings, Jackson and Rue became aware of Downing's method of operating his drug business.

Jackson helped Downing pick out and purchase a motor home, which Downing used to make frequent trips to Arizona to purchase large quantities of marijuana. Downing would then drive the loaded motor home back to Dayton, where he and others sold the marijuana. Downing stored the marijuana in the motor home, which he kept parked in a storage facility.

On June 9, 1998, Jackson and Rue were involved in an altercation at McGonegal's restaurant, and McGonegal fired them. After they were fired, Jackson and Rue made a number of threats and generally harassed McGonegal.

The harassment culminated on June 12, 1998, when Jackson called McGonegal and informed her that he had called the police to inform about Downing's business and the location and contents of the motor home. When the call ended, Downing and McGonegal immediately drove to the storage facility to get the motor home and move it before the police arrived.

Meanwhile, the police department received the tip from Jackson regarding the location and contents of the motor vehicle. The police dispatched officers to look for a motor vehicle matching the description provided by the informant

leaving the storage lot.

When McGonegal and Downing arrived at the storage facility, they found Jackson and Rue in front of the lot. Jackson and Rue began taunting McGonegal and Downing. McGonegal and Downing promptly fled and proceeded to drive around to the back of the facility to see if there was a way to get inside. Finding that there was not, McGonegal drove Downing to a nearby shopping center so that he could make a phone call.

When Downing returned to the car, he told McGonegal that he had informed his business partners of the situation. Downing stated that this situation was McGonegal's fault, and that she had to move the motor home or "they" would kill her.

McGonegal walked into the storage facility, started the vehicle, and drove it from the lot. The police watched her leave and stopped her when she violated a traffic law. The officers noticed a strong smell of marijuana when they approached the motor home. McGonegal did not produce a valid driver's license, so the officers detained her in a patrol car and called for a drug-sniffing dog. The dog alerted upon the vehicle, and the officers had the vehicle towed to an impound lot. Subsequently, a search warrant was obtained for the vehicle, and a search revealed more than 300 pounds of marijuana inside.

McGonegal was arrested for driving without a license and failure to properly signal for a turn. She was transported to the police department, where she waived her rights and made oral and written statements to Det. Mike Auricchio and

Sgt. Wilhelm.

McGonegal stated that she met Downing in San Diego and, when he moved to Dayton, she followed him. She stated that Downing ran a drug business, and that she frequently drove to Arizona with Downing to pick up large quantities of marijuana to sell in Dayton. On one occasion she flew to Arizona to meet Downing there, carrying approximately $100,000 which Downing used to buy marijuana that they then transported back to Dayton. McGonegal stated that Jackson and Rue, her former employees, called her to tell her that they had informed the police about the location and contents of the motor home. She stated that Downing demanded that she drive the motor home out of the storage lot.

On July 14, 1998, McGonegal was indicted and charged with one count of possessing marijuana in an amount over 20,000 grams. McGonegal sought to suppress certain evidence, but her motion was denied. She was tried by a jury on October 16-18, 2000. The jury returned a guilty verdict on October 19, 2000. On December 6, 2000, the trial court imposed a sentence of a prison term of eight years.

McGonegal filed timely notice of appeal. She presents two assignments of error.

FIRST ASSIGNMENT OF ERROR

THE PROSECUTION COMMITTED MISCONDUCT TO THE EXTENT THAT IT DENIED APPELLANT A FAIR TRIAL, AS GUARANTEED BY THE DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION TEN OF THE OHIO CONSTITUTION, WHEN IT CALLED A REBUTTAL WITNESS WHO COMMENTED ON APPELLANT'S POST-ARREST SILENCE

McGonegal argues that the prosecution committed misconduct when it presented evidence regarding her post-arrest silence. However, McGonegal waived her right to remain silent when she was arrested and questioned at the police department. The testimony shows that McGonegal spoke freely with Det. Auricchio and Sgt. Wilhelm, and prepared a lengthy written statement. What she said in those interviews is admissible against her. Evid.R. 801(D).

During the interviews, McGonegal did not speak of any threats or coercion that she received from Downing. Yet, at trial, McGonegal put on the defense of duress, stating that Downing was physically and psychologically abusive toward her throughout the relationship, and that he abused drugs and alcohol. McGonegal emphasized that Downing had made threats to her safety if she did not move the motor vehicle.

The State sought to exploit the inconsistency between McGonegal's statement on the day she was arrested and her testimony at trial by calling a detective who had acted as the

case agent as a rebuttal witness. Det. Anita Hauser testified that she did not become aware that McGonegal was claiming duress until the first day of the trial when, in the opening statement, her defense attorney focused squarely on Downing's pattern of abuse and his threats the day of the incident.

As an initial matter, we reject Defendant-Appellant's claim that the matter of which she complains amounts to prosecutorial misconduct. The test for prosecutorial misconduct is whether the prosecutor's acts were improper in their nature and character and, if they were, whether the substantial rights of the defendant to a fair trial were prejudiced thereby. *State v. Smith* (1984), 14 Ohio St. 3d 13, 470 N.E.2d 883. It is not enough to argue that prejudice resulted from the prosecutor's actions. The prosecutor's conduct must itself be improper. That element is wholly lacking here. We shall address the prejudice argued, but in terms of the error that might apply. We strongly caution defense counsel against impugning the professional integrity of prosecutors through misplaced claims of misconduct.

We begin by noting that "the admission or exclusion of relevant evidence rests within the sound discretion of the trial court." *State v. Sage* (1987), 31 Ohio St. 3d 173, 510 N.E.2d 343, paragraph two of the syllabus. A reviewing court may not reverse the trial court's decision on the admission of evidence absent an abuse of discretion. *Peters v. Ohio State Lottery Comm.* (1992), 63 Ohio St. 3d 296, 587 N.E.2d 290. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St. 3d 217, 219, 450

N.E.2d 1140.

In order to admit extrinsic evidence of McGonegal's prior inconsistent statements through the testimony of Det. Hauser, the State was required by Evid.R. 613(B) to afford McGonegal an opportunity to explain or deny the inconsistency. The record shows that it did.

During McGonegal's case-in-chief, the State elicited the following testimony from McGonegal on cross examination:

> Q. . . .my question to you is, Ma'am, the -- the thing that's on your mind at the moment you talk to [Det.] Auricchio is the threats that Ron Jackson has been making. You, in fact, make no reference whatsoever anywhere in there to Ron threatening you; do you? None.
>
> A. Excuse me?
>
> Q. You make no reference to Robert [Downing] -- pardon me, threatening you in that statement?
>
> A. No, I did not.

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McGonegal didn't deny the inconsistency between her interview statements and her trial testimony; in fact, she conceded it. Even so, the State was authorized by Evid.R. 613(B) to exploit the inconsistency through the testimony of

Det. Hauser, though it was cumulative to McGonegal's own admission.

The first assignment of error is overruled.

SECOND ASSIGNMENT OF ERROR

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR AND VIOLATED THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION WHEN IT ADMITTED EVIDENCE THAT APPELLANT WAS INVOLVED IN OTHER DRUG TRANSACTIONS NOT COVERED IN THE INDICTMENT

McGonegal argues that evidence that she accompanied Downing to Arizona on numerous occasions to buy large quantities of marijuana and transport it back to Dayton was inadmissible "other acts" evidence.

During his testimony, Det. Auricchio read McGonegal's written statement from the day of the arrest into the record. In the statement, McGonegal admitted that she flew to California two weeks earlier to meet Downing, and they proceeded to Arizona to pick up a load of marijuana, which they then transported back to Dayton in the motor vehicle. After he took her statement, Auricchio questioned McGonegal further regarding Downing's drug business. McGonegal told him that she had gone to Arizona with Downing to buy marijuana on about ten occasions in the previous three years, that Downing usually bought about 600 pounds of marijuana on each trip, and that once she had flown to Arizona with approximately $ 100,000 that Downing used

to make a marijuana purchase.

Det. Kevin Bollinger, a detective who was involved in the case, testified on McGonegal's behalf. On cross examination, Bollinger testified that McGonegal had told him that she accompanied Downing on eight trips to Arizona, and that the amount of marijuana that they brought back ranged from 150 to 600 pounds.

Again, we note that decisions regarding the admission of evidence generally rests within the discretion of the trial court, and we may reverse only where an abuse of discretion is demonstrated. *Peters, supra.*

This assignment of error involves the interplay of three rules of evidence. First, an out of court statement is not hearsay if it is a statement of admission by a party, offered by a party opponent. Evid.R. 801(D).

Second, evidence of other crimes, wrongs, or acts is not admissible to prove a defendant's criminal propensity. Evid.R. 404(B). "Other acts" evidence is admissible, however, if "(1) there is substantial proof that the alleged other acts were committed by the defendant, and (2) the evidence tends to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *State v. Lowe (1994)*, 69 Ohio St. 3d 527, 530, 634 N.E.2d 616. *See also* Evid.R. 404(B); *R.C. 2945.59*. However, we have held that in order for testimony to be admitted under an exception to Evid.R. 404(B), the matter concerned must genuinely be a material issue. *State v. Smith* (1992), 84 Ohio App. 3d 647, 617 N.E.2d 1160.

Finally, we must note the general rule regarding character evidence: if the prejudicial effect of the evidence substantially outweighs its probative value, the evidence is inadmissible. Evid.R. 403(A).

The parties do not dispute that McGonegal's statements regarding other trips to Arizona are admissions, and therefore are not hearsay pursuant to Evid.R. 801(D). However, McGonegal argues that none of the Evid.R. 404(B) exceptions apply, while the State argues that McGonegal's duress defense made motive a material issue.

Motive has been defined as "a mental state which induces an act," *State v. Curry* (1975), 43 Ohio St. 2d 66, 70, 330 N.E.2d 720, and the "cause or reason that moves the will and induces action," Black's Law Dictionary (5.Ed.Rev.1979) 914.

Duress is an affirmative defense to criminal liability under some circumstances. *State v. Cross* (1979), 58 Ohio St. 2d 482, 391 N.E.2d 319. We have previously stated that "[a] person whose free will has been overcome by coercion or threats from another person, and as a result commits an act which he otherwise would not have committed that constitutes a crime, may under certain circumstances be found not criminally liable for that crime." *State, City of Dayton v. Stiles* 1998 Ohio App. LEXIS 2614 (June 12, 1998), Montgomery App. No. 16588, unreported.

We find that the concept of "motive" and the defense of "duress" are so intertwined that by claiming duress, McGonegal placed her motive in issue. That, in turn, opened the door to admission of relevant "other acts" evidence to

rebut the duress defense. Testimony concerning McGonegal's actions on prior occasions was certainly relevant to prove that her motive on the occasion of her alleged offense was not what she claimed it to be, and the relevance of the statements is not outweighed by any prejudice that may have resulted.

The trial court did not abuse the substantial discretion afforded it when it admitted "other acts" evidence regarding McGonegal's prior involvement in drug activity. The second assignment of error is overruled.

Conclusion

Having overruled each assignment of error presented, the judgment from which the appeal is taken will be affirmed.

WOLFF, P.J. and YOUNG, J., concur.

APPENDIX D

IN THE SUPREME COURT OF OHIO

C.A. No. CA-18639
T.C. No. 99-CR-02045

[Filed December 14, 2001]

STATE OF OHIO)
Plaintiff-Appellee,)
)
v.)
)
CAROL LEE McGONEGAL)
Defendant-Appellant.)

ON APPEAL FROM THE COURT OF APPEALS
FOR THE SECOND JUDICIAL APPELLATE DISTRICT
OF OHIO, MONTGOMERY COUNTY, OHIO

APPELLANT'S MEMORANDUM IN SUPPORT OF SUPREME COURT JURISDICTION

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Appellant's Memorandum in Support of Supreme Court Jurisdiction - 12/14/01

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(11th Cir. 1982) 666 F.2d 498, 502

WHY THIS COURT SHOULD GRANT JURISDICTION

In the first argument, appellant maintains that even though she willingly spoke to police officers after she was advised of her *Miranda* rights, she nonetheless had a right to remain silent with respect to the fact that she committed this offense only under threat of harm. She believes that the prosecution committed misconduct, and that the trial court erred, when a rebuttal witness suggested that that duress defense was "cooked up" only as part of a trial strategy.

By accepting jurisdiction on this issue, this Court can clarify whether a defendant retains the right to remain silent on an aspect of the case while confessing to other aspects of the case.

With respect to the second argument, appellant was charged with a specific drug offense on a specific date. Yet much of the trial consisted of evidence of her participation in many other large quantity drug trafficking offenses. Whenever the prosecution seeks to have inflammatory evidence admitted, there is always a tension between the state's desire to prove its case with that evidence, and the

defendant's constitutional right to have the verdict based on the merits of the case and not on some visceral reaction to the "other acts" evidence. By accepting jurisdiction in this case, this Court has the chance to again reestablish the considerations a trial court must make when faced with this difficult choice. Because trial courts are constantly addressing this issue, appellant believes it would be a good idea for this Court to again set out its thoughts on this topic.

STATEMENT OF THE CASE

On July 14, 1998, appellant was indicted and charged with one count of possessing marijuana in an amount over 20,000 grams. R.C. 2925.11(A). After a trial, the jury returned a guilty verdict on October 19, 2000.

The trial court imposed sentence on December 6, 2000. It sentenced appellant to a prison term of 8 years. Appellant then appealed to the Court of Appeals for Montgomery County. On November 2, 2001, that Court affirmed the conviction in its entirety. From that decision, this memorandum and notice of appeal follow.

STATEMENT OF FACTS

Appellant is in her middle fifties. She had lived for a long time in San Diego. She married in 1980 and raised a family there. (TR 309.) However, she and her husband separated in 1992 or 1993. (TR 309.) In 1995 appellant met

Robert Downing[1], and the two of them became romantically involved. (TR 259.) At some point thereafter, Downing moved to Dayton and he established a marijuana trafficking business. After that, appellant moved to Dayton to be with her boyfriend. (TR 264-265.) The two of them lived in a house in a house that Downing had purchased. (TR 262.)

In 1997 appellant established her own business, a restaurant called What's Cooking. (TR 293, 341.) According to one police officer, the restaurant appeared be profitable and well run, and did not seem to be connected in any way with Downing's drug trafficking business. (TR 255, 267.)

However, two of appellant's restaurant employees also sold marijuana for Downing. Appellant fired these two employees, and they decided to get even. (TR 156.) On the afternoon of June 12, 1998, Ron Jackson, one of the employees, called the restaurant and told appellant that he was calling the police to report about a motor home filled with marijuana. (TR 342.) Appellant then gave the phone to Downing. Afterward, Downing told appellant that they had to go to the storage area. (TR 343.) The two then drove to a storage facility called the Lock-and-Store. When they arrived the former employees were there and they began taunting the couple. (TR 343.) Downing and appellant then left but returned soon after. (TR 344.)

The defense evidence showed that the couple stopped

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[1] "Robert Downing" is actually an alias. His real name is Andre Ghanime. (TR 257.)

somewhere, where Downing made a phone call. When he returned to the car, he told appellant that she had to drive the motor home off of the Lock-and-Store lot. He said that if she did not do so, "they" would kill her. (TR 344-346.) Appellant felt she had no choice but to comply, and thought that if she refused appellant would become physically violent toward her. (TR 244-246.) For that reason she agreed to drive the vehicle off of the lot. (TR 346.)

Apparently, Ron Jackson had made good on his threat. On that same afternoon someone had called the police to report about a marijuana-filled motor home in the Lock-and-Store facility. (TR 97.) Police dispatch then sent several officers to see if a motor home matching the description might be driven off the lot. The officers intended to initiate a traffic stop if the vehicle left the lot. (TR 24, 59, 98.) And sure enough, the officers at the scene saw a motor home drive out of the lot. The officers stopped the vehicle. (TR 33-34, 62-63.) Appellant was driving, and she was the only occupant. (TR 35, 63.) The officers immediately noticed a strong odor of marijuana emanating from the motor home. (TR 35, 63-64, 88.) They arrested appellant when they learned that her California driver's license had been suspended. (TR 37-38, 67.) The officers soon discovered about 300 pounds of marijuana inside the vehicle.

After she was arrested, appellant cooperated with the police and she made a written statement. (TR 156-159.) In the statement she said that after the phone call from Ron Jackson, Downing "demanded" that she go to the storage facility and drive the motor home off of the lot. (TR 157.) She did so as Downing waited outside. (TR 157.) In the statement appellant

also inferred that the marijuana and the marijuana business was Downing's. She said that about 600 pounds of marijuana had been brought from Tucson, but that she had no idea of how much was left in the motor home, "for Robert [Downing] took care of his business without me. How much money was received was kept from my knowledge. It was not kept at the house." (TR 158.) Appellant did not know the last name of the person Downing sold the marijuana to, and while she did know that Ron Jackson and Mel [the other fired employee] had sold for Downing, she did not know how much. (TR 158.) Finally, appellant admitted accompanying Downing when he made marijuana purchases in Tucson. She said that the transactions were conducted in Spanish, in which Downing is fluent. (TR 158-159.)

The defense argued that appellant had acted under duress. Appellant's former husband, James, testified that appellant changed dramatically after she moved to Dayton to be with Downing. James recounted how in the spring of 1997, Downing called him to say that he wanted James' help to have appellant committed. Downing told him that appellant was simply incompetent to run a business and to raise her and James' son. (TR 312.) (Appellant had custody of her and James' 17-year-old son.) Downing would constantly berate appellant to her face, all the while using vile epithets. (TR 313-315.) In a visit to Dayton in late 1997, James told of how at one dinner Downing continued demeaning appellant in front of James and their son. Downing hit appellant with a phone. (TR 316-317.) In subsequent phone calls to James, appellant was constantly distraught and sobbing over her situation. She was entirely different than the person to whom he had been married. (TR 317-318.) Finally, in May of 1998,

appellant called James and insisted that he remove their son from her custody. She said that she could no longer guarantee his safety. James came to Dayton and retrieved his son. (TR 318-319.) James also testified that as a general matter, Downing was constantly drinking, and that he had a very unpredictable personality. (TR 321.)

Angus, appellant and James' son, testified that Downing was a heavy drinker who had severe mood swings. Downing constantly called appellant names, and these insults came "out of nowhere." (TR 325-326.) He also told of the many occasions when appellant and Downing would fight all night long. (TR 326.) Angus had seen Downing hit his mother, and he feared for her safety. (TR 327-328.) Angus also reported that shortly before he moved back to San Diego, Downing kicked Angus out of a car. This act inspired Angus to start packing his bags. Downing picked up one of the suitcases and threw it at appellant. The hit left her bruised. (TR 327.)

A friend of appellant's, who worked at her restaurant, also testified. This witness had also lived with appellant and Downing for about six or eight months. (TR 294.) She verified that Downing would constantly demean and humiliate appellant, and call her vile names. (TR 296-297.) Once, Downing chased appellant up the stairs and threatened to kill her. (TR 297-298.) Downing once kicked appellant, and he constantly berated her even in the restaurant. (TR 298-399.) The couple argued at night. (TR 299.) Appellant was constantly bruised. (TR 300.) Downing was a drunk; he drank all day long. (TR 301.) The witness moved from the house and stopped working at the restaurant after Downing asked

her to take over the restaurant once he "got rid of" appellant. (TR 302.)

Appellant also testified, and she confirmed that Downing was an abusive tyrant. She told of an incident on Christmas of 1997, when she and appellant had traveled to Phoenix with Angus. Downing woke them in the middle of the night, and kicked them both out of the apartment. (TR 346-348.) Downing constantly demeaned and criticized appellant; he was always "going off." (TR 348.) He wanted to control everybody. (TR 352.) He physically abused appellant too. He pulled a gun on her, and he repeatedly threatened to kill her. (TR 349.) When she told him that she wanted to return to California, Downing replied that appellant knew too much and that if she did so she would be killed. (TR 351.) Downing used heroin. (TR 353.)

While appellant was aware of Downing's marijuana operation, and while she accompanied him on his buying trips, she did not actually participate. (TR 358-359.) She had never before been to the Lock-and-Store, and she did not know the combination for entering the facility. (TR 360.) Linda Mershot, Downing's ex-wife, partnered with him in the trafficking business; she handled the books and the money. (TR 361.)

The defense also called Kevin Bollinger to testify. Bollinger is a Dayton police detective assigned to the narcotics bureau. He works at the state and federal level, and was the primary investigator on the follow-up investigation in this case. (TR 249.) He testified that Downing has two convictions from Canada; one a theft, the other a drug

offense. In addition, Downing has a warrant out from Rome, Italy, where he was accused of possessing five kilograms of heroin. Bollinger also testified that Downing may well have some convictions in Mexico. (TR 253-254.)

Bollinger testified that his investigation revealed that: 1 - appellant did not directly profit from Downing's transactions, and she had no drug money in her bank accounts (TR 254-255); 2 – her restaurant was not purchased with drug money, nor was the business in any way a "front" for Downing's business (TR 255); 3 – in her dealings with authorities, appellant was straightforward and held nothing back (TR 255-256); 4 – appellant did not directly sell or buy marijuana, and the drug business, including the marijuana found on June 12, was Downing's and his ex-wife's, Linda Marshot (TR 256-257); 5 – prior to June 12, appellant had never driven any vehicle containing marijuana unless Downing was also present (TR 258); 6 – appellant never paid for any of the drug trips, and she never received a percentage of his profits from drug sales (TR 258-259); 7 – in the investigation, appellant was very cooperative, and her information proved to be very useful, even essential. (TR 280.)

On cross-examination, Bollinger revealed that Downing and Marshot are now in federal court as a result of the facts underlying this case. (TR 269.) Bollinger also testified that there has been a conflict between the state and federal authorities with respect to this case. Bollinger believed that appellant's case should have been in federal court and not in state court. (TR 278-280.)

FIRST PROPOSITION OF LAW

A PROSECUTOR COMMITS MISCONDUCT WHEN HE OR SHE CALLS A REBUTTAL WITNESS TO TESTIFY ON AN ASPECT OF THE DEFENDANT'S POST-MIRANDA CHOICE TO REMAIN SILENT, AND THE TRIAL COURT ALSO ERRS WHEN IT ALLOWS THAT TESTIMONY

Appellant did not deny driving the motor home containing the marijuana, and in fact she admitted that she knew of her boyfriend's drug dealings. However, she denied that she was involved in the drug trade herself, and she maintained that she only drove the motor home on the day of the arrest because of Downing's threats of bodily harm if she refused. Thus, appellant relied on a defense of duress, that she committed the offense only because she was forced to.

During the trial the prosecution objected to appellant presenting a duress defense, on the ground that the prosecution did not receive proper notice. The trial court overruled that objection, and noted that appellant had requested a jury instruction on duress well before trial began, and that the prosecution had received notice of that request.

However, and notwithstanding the court's ruling, the prosecution sought to sabotage the duress defense by suggesting that it was made up for the purposes of trial. A police detective, who was also the case agent and who sat with the prosecution throughout trial (TR 114), testified on rebuttal. Under prosecutorial questioning, the witness testified that based on her review of the records and her familiarity

with the proceedings, the appellant had never claimed duress until the first day of trial. Defense counsel's strenuous objections to this line of questioning were overruled. (TR 393-396.) Appellant contends that this evidence was inadmissible comment on appellant's choice to remain silent after her arrest.

The privilege against self-incrimination is guaranteed by the Fifth Amendment of the United States Constitution. The self-incrimination clause "is founded on a complex of values," all of which support one overriding thought: the respect a government "must accord to the dignity and integrity of its citizens." Miranda v. Arizona (1966) 384 U.S. 436, 460. Thus, the Fifth Amendment "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." Griffin v. California (1965) 380 U.S. 609, 615.

It is well established that a defendant may not be penalized for exercising his or her constitutional rights. In Griffin v. California, the court held that the prosecution could not *use* the fact that a defendant chooses to invoke the right not to testify. Similarly, it is fundamentally unfair for a prosecutor to insinuate that a defendant's post-Miranda silence is evidence of guilt or evidence of a comprehension level inconsistent with an insanity defense. Doyle v. Ohio (1976) 426 U.S. 610.

It is clear that a prosecutor may not comment on the fact that a defendant chose to remain silent after receiving Miranda warnings. Doyle v. Ohio, supra. See also State v. Rahman (1986) 23 Ohio St.3d 146, 152; State v. Rogers

(1987) 32 Ohio St.3d 70. Just as clearly, the prosecution here elicited comment on that fact. By eliciting from the rebuttal witness that appellant did not even hint that she acted under duress until the trial began, the state sought to convict appellant by her own silence. Perhaps even worse, the state's rebuttal evidence invited the jurors to convict appellant based on her *attorney's decision* not to share the duress defense with the prosecution prior to trial. Thus, the prosecution sought to convict appellant because she chose to remain silent about an aspect of her defense until the day of trial. But just as clearly, the prosecution may not use a defendant's post-arrest silence to obtain a conviction.

Appellant also contends that by asking the question that called for a comment on appellant's decision to remain silent, the prosecution committed misconduct. The prosecutor and the defense attorney are not on the same footing when it comes to evaluating whether either committed misconduct. While both serve as advocates, the prosecution also represents "a sovereignty whose obligation [is] to govern impartially." Berger v. United States (1935) 295 U.S. 78, 88. Thus, the prosecutor's interest should not be in winning a criminal case, but in seeing that justice is done. Ibid. Misconduct will be deemed to have denied a defendant a fair trial when the misconduct creates a danger that the jury would convict the defendant on extraneous considerations rather than on the evidence. Taylor v. Kentucky (1978) 436 U.S. 478, 488. "The touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." Smith v. Phillips (1982) 455 U.S. 209, 219.

When misconduct is alleged, a reviewing court must apply a two-part test. First, the court must decide whether the remarks were improper. If so, then the court must decide whether the remarks prejudicially affected substantial rights of the defendant. State v. Smith (1984) 14 Ohio St.3d 13. If both parts of the test are met the conviction must be reversed. Ibid.

Improper prosecutorial remarks are those that go beyond the evidence presented to the jury. Remarks that attack the integrity of defense counsel are also improper. State v. Cantlebarry (1990) 69 Ohio App.3d 216, 224. Moreover, "the prosecutor may not invite the jury to judge the case upon standards or grounds other than the evidence and law of the case." State v. Draughn (1992) 76 Ohio App.3d 664, 671.

Here, appellant believes that the prosecution's decision to elicit comment on the defense's choice to remain silent amounted to misconduct. The statement went beyond the evidence, and instead attacked the defense's strategic choices. Further, the remark invited the jurors to decide the case not on the evidence or the law, but rather on matters that they had no business considering.

In its opinion the court of appeals concluded that there was no misconduct since the prosecutor committed no act that in and of itself was improper. This suggests that the prosecutor must speak in order to commit misconduct. Appellant disagrees. She believes that the insistence on calling a witness to testify about forbidden topics can amount to misconduct. But in the alternative, appellant also contends that the trial court erred by allowing the testimony.

Appellant presented convincing evidence, much of it from a police detective on the case, that she was not "player" in Downing's drug trafficking endeavors. Appellant and Downing were a romantic couple. And while she may have been aware of his drug dealings, and while she might have accompanied him on several buying trips, there was strong evidence to suggest that she was "just along for the ride." Further, there was also strong evidence to suggest that appellant's relationship with Downing was spiraling downward very fast, and that he was an abusive "control freak" whom she had come to fear. Thus, there was substantial evidence from which the jury could have concluded that appellant did in fact act under duress on July 12, the day of the arrest.

But the rebuttal testimony entirely undercut that defense. By telling the jurors that she had heard no suggestion of a duress defense until the first day of trial, the police detective (and case agent) also strongly suggested that this "defense" was a fabrication, conjured up by the appellant in a desperate maneuver to avoid imprisonment. But the problem with that evidence is that it was also an impermissible comment on the defendant's post-arrest silence. Further, it invited the jury to convict based on what may well have been defense counsel's trial strategy.

SECOND PROPOSITION OF LAW

IN A DRUG PROSECUTION WHERE A DEFENDANT IS ACCUSED OF ONE OFFENSE ON A PARTICULAR DAY,

THE ADMISSION OF EVIDENCE OF MULTIPLE, UNCHARGED DRUG TRAFFICKING ACTS COMMITTED BY THIS SAME PERSON ON DIFFERENT OCCASIONS CAN BE SO PREJUDICIAL SO AS TO DENY THE DEFENDANT A FAIR TRIAL

Appellant was charged with a specific offense. The indictment alleged that she possessed a certain amount of marijuana on July 12, 1998. However, the prosecution's evidence also posited that she had accompanied Downing on several drug-buying trips to Arizona, in incidents unrelated to the possession charge on June 12.

When the prosecutor examined Detective Auricchio, he elicited information that appellant had, for the three years preceding her arrest, accompanied Downing on about ten buying trips to Arizona. According to the witness, appellant had admitted that on each of these trips Downing bought about 600 pounds of marijuana, and they would drive it back to Dayton in the motor home. In addition, Auricchio told about an incident in which appellant reported that she once flew alone to Arizona, and carried about $100,000 for a marijuana purchase.[2] Appellant's objection to these "other acts" was overruled. (TR 161-162.) Later, Detective Bollinger testified that appellant admitted to accompanying

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[2] As with the other incidents, appellant disclaimed actually making the purchase. She took the money out so that Downing could ultimately make the transaction. (TR 162.)

Downing on exactly eight buying trips, and on each occasion Downing bought between 150 and 600 pounds of marijuana, that they would drive back to Dayton in the motor home. (TR 281-282.)

In this argument appellant contends that the evidence of these other acts was unnecessary and incidental to the prosecution of this one possession offense, and that the admission of that evidence was prejudicial error.

The "other acts" evidence was not related to the present charges. The general rule is that prior offenses are not admissible to prove any element of an offense of which a defendant is being tried. State v. Hector (1969) 19 Ohio St.2d 167. This is so because evidence of other acts "carries the potential for the most virulent kind of prejudice for the accused." State v. Snowden (1976) 49 Ohio App.2d 7, 8.

Evidence Rule 404(B) and R.C. 2945.59 also generally preclude the admission of other crimes, wrongs or other acts to prove that a defendant committed the crime of which he or she is charged. However, these provisions state that other acts *may* be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Evidence Rule 404(B) and R.C. 2945.59 codify exceptions to the common law and so they must be conservatively applied and strictly construed against the state. State v. Burson (1974) 38 Ohio St.2d 157, 158-159. The other act may or may not be similar to the crime charged, but to be admissible it must tend to show by substantial proof one or more of the things enumerated in Evidence Rule 404(B). State v. Broom (1988)

40 Ohio St. 3d 277. In addition, even if the other act is admissible under Evidence Rule 404(B), it is nevertheless inadmissible if its prejudicial effect outweighs its probative value. Evid. R. 403(A), State v. Matthews (1984) 14 Ohio App.3d 440. Admission of other acts is particularly dangerous when the other act is similar to the charged offense. State v. Schaim (1992) 65 Ohio St.3d 51, 59. In this case none of the exceptions by which "other act" evidence is admissible are applicable.

First of all, motive or intent were not at issue. The prosecution charged appellant possessing marijuana. Thus, the state was required to prove that she acted knowingly - that she was aware that her conduct would probably cause a certain result or be of a certain nature, regardless of his purpose. (R.C. 2901.22(B).) If appellant committed the charged acts, then her purpose was not at issue. Nor was her intent, which is implicit in the acts charged. The only issue was whether she committed the acts. That issue cannot be proved by evidence of other acts because that proof necessarily relies on the prohibited inference of propensity.

Nor was scheme, plan or system at issue. In State v. Curry (1975) 43 Ohio St.2d 66, the Court discussed the two factual settings in which a defendant's "scheme, plan, or system in doing an act is relevant in a criminal trial." One is when identity is at issue, a factor that is clearly not at issue here. The other instance is when "the other acts form part of the immediate background of the alleged act which forms the foundation of the crime charged in the indictment." However, to be admissible under this rationale, it must be "virtually impossible" to prove the charged offense without also

admitting the other act. "[T]he 'other acts' testimony must concern events which are *inextricably related to the alleged criminal act*." Id., at p. 73 (emphasis supplied.)

In this case the earlier incidents were chronologically and factually separate, and thus were not "inextricably related" to the possession offense. State v. Smith (1992) 84 Ohio App.3d 647, 667; State v. Lewis (1990) 66 Ohio App.3d 37, 41. "Courts have admitted extrinsic act evidence to show a defendant's design or plan to commit the specific crime charged, *but never to show a design or plan to commit 'crimes of the sort with which he is charged.'*" United States v. Gothard (11th Cir. 1982) 666 F.2d 498, 502, citing United States v. Goodwin (5th Cir. 1974) 492 F.2d 1141, emphasis supplied. This is not a case where it was "virtually impossible" for the state to prove the offenses without also presenting evidence of the earlier alleged acts. State v. Curry, supra. The various events were just not inextricably related; they occurred at different times and they were thus chronologically and factually separate. State v. Smith, supra.

In addition, appellant did not deny knowing that there was marijuana in the motor home, and she did not deny a general knowledge that Downing was involved in the drug trade. However, her defense was that she was not part of the trafficking, that she was not a "co-possessor" of the marijuana, and that she only drove the motor home under threat of death or bodily harm. Based on that factual scenario, there was simply no need for the jury to hear of the other transactions.

Nor was absence of mistake or accident at issue.

Appellant never denied her awareness of Downing's involvement in drug trafficking, and she never denied knowing that there was marijuana in the motor home she was driving on the day of her arrest. Thus, mistake or accident is not a material issue.

The admission of the other acts was prejudicial. Appellant was charged with a specific offense on a specific date. But the state's evidence revealed that she also accompanied Downing on eight marijuana buying trips in which hundreds of pounds of marijuana were transported to Dayton. A reasonable juror could have construed that evidence to undercut the duress defense.

Further, the trial court here never instructed the jurors about how they should consider the other act evidence. Typically, when a prior offense is admissible at trial, the trial court must also instruct the jurors "that such evidence must not be considered by them as any proof whatsoever that the accused did any act alleged in the indictment." State v. Flonnory (1972) 31 Ohio St.2d 124, 129. (See also, 4 OJI 402.61.)

CONCLUSION

For the reasons stated in the foregoing memorandum, appellant asks that this Court grant jurisdiction.

Respectfully submitted,

/s/ _____

JON PAUL RION of
RION, RION & RION, L.P.A., INC.

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that a copy of the Appellant's foregoing Memorandum in Support of Jurisdiction has been forwarded to the Attorney for the Plaintiff-Appellee, Carley Ingram, Montgomery County Appellate Prosecutor, P.O. Box 972, Dayton, Ohio 45422, this 13th day of December, 2001, via regular U.S. mail.

/s/_____
JON PAUL RION of
RION, RION & RION, L.P.A., INC.